

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

CHARLES D. GOODWIN, INC.,

Respondent.

**Docket No. FMCSA-2008-0018¹
(Southern Service Center)**

ORDER REQUESTING CLARIFICATION

1. Background

On January 20, 2009, Respondent, Charles D. Goodwin, Inc., and Claimant, the Field Administrator for the Southern Service Center, Federal Motor Carrier Safety Administration, entered into an agreement to settle a \$35,330 claim against Respondent for six alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs).² Paragraph 5 of the settlement agreement states that FMCSA will suspend the total claim³ if Respondent will:

Install an EOBR [electronic on-board recorder] on each CMV in the carrier's custody or control on or before February 16, 2009 and all drivers will have been trained in their usage. These EOBR devices will be maintained for the duration of this agreement and [Claimant] will have access to all data from these drivers upon request. This agreement will be in effect from February 16, 2009 until February 16, 2013.

Paragraph 6 of the settlement agreement states that "RESPONDENT will fully comply with the requirements of this Agreement for the full term of years.... If ...

¹ The prior case number of this matter was NC-2007-0114-US0609.

² Execution of the settlement agreement constituted admission of the violations in accordance with paragraph 4.

³ The actual language of the settlement agreement is: "FMCSA will suspend \$35,330 of the total claim...." But \$35,330 is the total claim.

Respondent has complied completely ... the **100%** suspended portion (**\$35,330.00**) of the original penalty (**\$35,330.00**) will be permanently forgiven.” (Upper case and bold in original.) Paragraph 7 explains how Respondent was to pay “0% of the Civil Penalty, which equates to \$.00 (0% x \$35,330 = \$.00).” The paragraph sets forth the procedures for paying 0% of the civil penalty - either electronically through the SAFER (FMCSA’s Safety and Fitness Electronic Records System) website or by certified check, cashier’s check or money order. It even provides an address for the mailing of the 0% civil penalty and, to expedite the processing of this 0% payment, the FMCSA case number should be annotated on the check. Paragraph 8 provides: “The first payment of \$35,330 is due no later than 45 days after any of the conditions outlined in paragraph #5 be [sic] violated.”

Paragraph 9 states: “Any payment not received by the due date shall be considered late and will not be accepted. Failure to make timely payments shall subject Respondent to the penalties set forth in this Agreement in addition to any other penalties or remedies available by law.” Beginning with the second sentence, Paragraph 10 provides, in pertinent part:

Failure to pay in accordance with the terms of this Agreement will result in the loss of any reduction of penalties ... and the full amount of **\$35,330.00** will be immediately due and payable (less any payments made). Thus, if any payment is not received by the due date, the payment plan set out above will be void, and [Claimant] will take steps to immediately collect **\$35,330.00**, less any payment made by Respondent.... If the entire amount is not paid within 90 days of the missed due date, Respondent will be prohibited from operating a CMV in interstate commerce and, if applicable, Respondent’s registration will be suspended or revoked....

On March 4, 2009, Claimant moved that the proceedings be terminated and the docket closed.⁴

2. Discussion

This settlement agreement illustrates what happens when Claimant, who drafted the agreement, merely plugs in numbers to an otherwise boiler-plate document. As will be shown, a one-size boiler plate does not fit all.

Certainly, paragraph 7 has no place in the settlement agreement and should be eliminated. While the form of payment and an address to which that payment should be sent might be appropriate should Respondent fail to comply with paragraph 5 – more on that later – that information should follow paragraph 8, not precede it. Moreover, it is hard to imagine that Claimant would not accept a \$35,330 payment in accordance with paragraph 9 even if it were later than the 45 days set forth in paragraph 8. To say that a late payment will not be accepted ties Claimant's hands unnecessarily. Indeed, it is inconsistent with that portion of paragraph 10 that gives Respondent 90 days after the missed due date to pay the civil penalty.

In addition, Paragraph 10 is based on the loss of reduction in penalties for a failure to make timely payment, while paragraph 8 is based on a loss of reduction of penalties for failure to abide by paragraph 5. As a result, at least the second and third sentences of paragraph 10 make little sense in the context of this case. Because there is no loss of a reduction of the civil penalty due to a failure to make a timely payment, the settlement agreement should not state that there is. The loss of the reduction occurs only

⁴ The Agency's Rules of Practice, at 49 CFR 386.22(c), provide that a settlement agreement becomes the Final Agency Order as of the date that the Assistant Administrator enters an order accepting the agreement. Therefore, Claimant should also have moved that the settlement agreement be approved.

if Respondent does not comply with paragraph 5; if that were to happen, Respondent would be required to pay the full civil penalty. If Respondent were to fail to make a timely payment of the entire civil penalty, there would be – and could be – no further loss of reduction; at this point, no reduction would exist. Because there is no payment plan – Respondent must pay either “0%” of the civil penalty or the entire civil penalty – the payment plan cannot be void, even though paragraph 10 states that it is. Interest, penalties, and administrative charges might be assessed⁵ and the sanctions for failure to pay the civil penalty would be invoked, but there is no payment plan to void. And to say that Claimant will take steps to immediately collect the \$35,330 civil penalty because Respondent failed to pay the \$35,330 civil penalty on time adds nothing to the settlement agreement.

While the settlement agreement should have been drafted with the facts of this case in mind, its cumbersome language is not a sufficient reason for me to reject it.⁶ Of greater concern is that no standards are provided in paragraph 5 for what Respondent must do to maintain the EOBR devices.⁷ To say that the devices will be maintained for the duration of the settlement agreement in order to have the entire civil penalty forgiven, and to state in paragraph 8 that the entire civil penalty is due if any of the conditions

⁵ Claimant should not provide that “interest, penalties and administrative charges will be assessed” if he is not 100 percent certain that he will assess them. This is the same language contained in the settlement agreement concerning *In the Matter of Golden Eagle Transit, Inc.*, Docket No. FMCSA-2009-0044, Final Agency Order, February 12, 2009; and Final Agency Order: Order on Reconsideration, July 10, 2009; although Claimant attempted to collect the pre-reduction amount of the civil penalty in that matter, there is no evidence in the record that he attempted to assess interest, penalties, or administrative charges.

⁶ Nevertheless, Claimant is advised that future settlement agreements must be carefully drafted to ensure that they make sense in the context of the actual settlements.

⁷ It would also have been helpful had Claimant provided the full name of the device, not just the letters that represent the name.

“outlined in paragraph 5”⁸ is violated leaves me wondering whether the parties are on the same page as to what must be done to “maintain” the devices. Accordingly, I ask that the parties submit, within 30 days of the service date of this Order, an addendum clarifying the meaning of “maintain.” If I accept the addendum, I will issue an order terminating the proceeding and closing the docket.

It Is So Ordered.


Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4.15.10
Date

⁸ The conditions are set forth in paragraph 5; they are not outlined.

CERTIFICATE OF SERVICE

This is to certify that on this 16 day of April, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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Personal Delivery



⁹ Mr. Davis's name and address first appeared in Claimant's Motion to Terminate Proceedings and Close Docket. There is no record of any notice of appearance in the docket.